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Brf. of D. McClure for P. E.

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In the Supreme Court of the United States.

Writ of Error to the Court of Errors and Appeals of the State of New Jersey.

JOHN McQUADE,
Plaintiff-in-error,

vs.

THE INHABITANTS OF THE CITY OF TRENTON.

BRIEF FOR PLAINTIFF-IN-ERROR.

DAVID McCLURE,
Of Counsel.

THE MARTIN B. BROWN COMPANY, Printers, 49 to 57 Park Place, N. Y.

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Supreme Court of the United States.

JOHN McQUADE,
Plaintiff-in-Error,

against

THE INHABITANTS OF THE CITY OF TRENTON.

Brief for Plaintiff-in-Error.

STATEMENT OF THE CASE.

In 1891 the Pennsylvania Railroad Company, being engaged in widening its tracks running through the City of Trenton, desired, in connection with this work, to elevate the bridge crossing its tracks on Lamberton street in that City. The elevation of the bridge necessitated the construction of approaches to it in Lamberton street and in the neighboring streets. For this purpose the railroad company applied to the Common Council of the City of Trenton, and procured from it an ordinance, passed on February 17th, 1891, authorizing the construction of the desired bridge and the making

of certain changes in the street-grades leading up to it on both sides so as to make a uniform approach to the bridge. This ordinance is set forth in full on pages 13 to 16 of the record. It specifically recites that it is made at the instance of the Pennsylvania Railroad Company, and for the purposes of that company in the widening of its tracks and roadbed (Record, p. 13), and, after establishing several alterations of grade, closes with the condition that the Pennsylvania Railroad Company must "provide means to carry off all of the surface waters whose present course will be directed or changed by the aforesaid alteration and changes in said streets," and must "furnish and pay for the labor and materials necessary to make such alterations, and indemnify said inhabitants of the City of Trenton against any expenses or losses which may be incurred as damages to property affected or otherwise by the said changes of grade and said vacation of portions of said street, which could be enforced against the city by suit, and shall within thirty days after the passage hereof file a satisfactory bond with the city solicitor for the faithful performance of said agreement before mentioned; and this ordinance shall not go into effect until the said bond is filed and the expense of the passage of this ordinance is paid."

Crossing Lamberton street, which runs from north to south, and somewhat to the southward of the railroad bridge, runs Ferry street, upon which, some little distance to the east of Lamberton street, stand two houses owned by Mr. McQuade, the plaintiff-in-error. The alterations authorized by the ordinance for the purpose of forming approaches to the railroad bridge included an alteration in the grade of Ferry street in front of these houses. The effect of this alteration was very materially to heighten the grade, and, whereas

before the change that street had sunk uniformly from east to west, so that the surface waters flowed off westwardly, after the change, at a point some distance east of Lamberton street, the grade of Ferry street was suddenly turned, so that from that point, instead of descending, it *ascended* westwardly, thus creating a hollow between the two opposite grades which tended to collect the surface waters from both sides (Record, pp. 13, 14, 18, 26).

It so happened that this point was only a little to the east of the plaintiff-in-error's houses (Record, pp. 6, 17, 18, 21) and hence one of the results of the grade-change was to accumulate water in front of these houses (Record, pp. 17, 26), so that the "surface water in times of heavy rain is likely to overflow the sidewalk and to flow into" the plaintiff-in-error's cellars (Record, p. 18). Another and even graver result of the change was the practical closing up of the windows of his cellars and the partial burying of his stoop, thus interfering with his light, air, access and egress to and from his property (Record, pp. 18, 19, 20, 29). To use his own language (Record, p. 20), "The cellar windows of the house in which this deponent resides will be almost completely buried beneath the surface of the sidewalk and the light and air thereby excluded from this deponent's property, and the stoop leading to the front door of this deponent's house will also be partially buried beneath the surface of the sidewalk." Moreover, the insertion of an inlet in front of the house in question, in connection with the pipes necessitated by the alteration of grade, affects the value of the property because of the bad odors attendant upon the stagnation of the waters in summer in what is called the check-basin (Record, p. 30). These are the injuries necessarily resulting to the plaintiff-in-error's property from the alteration in Ferry street.

The proceedings by which the ordinance was passed were objected to and resisted by the plaintiff-in-error from the beginning. On several occasions he attended the meetings of the Common Council at which this proposed ordinance was under consideration, and objected to the change of grade on Ferry street (Record, pp. 21, 24, 25). He even spoke in opposition to it (Record, p. 25). Several plans were considered, some of which would not have necessitated any such change and against these the plaintiff-in-error raised no objection (Record, p. 25). What he wanted was that Ferry street should not be disturbed (Record, p. 25). Accordingly, he was gratified when, even after the passing of the ordinance, but before the making of any changes, it was contemplated that the grade changes should be abandoned, and that the desired result should be reached by opening a new street north of the railroad (Record, p. 21). Indeed, he was, apparently, largely instrumental in procuring this change of plan, for he went around getting signatures to the paper objecting to the change in the street (Record, p. 22). His efforts were not successful. The new street-proposal was abandoned and the original plan was carried out in spite of his protests (Record, p. 22).

Before the passage of the ordinance an engineer of the Pennsylvania Railroad Company had come to Mr. McQuade and stated that this change of grade was to be effected and had asked him what he wanted. McQuade replied that he could not tell at that time. The engineer then said something about $500, which the plaintiff-in-error vigorously declined, and a few days later he told this same engineer that he hoped the change would not be made, but that since they were going to do it he would want $3,000. This was refused him, and thereupon he forbade them to interfere with his property (Rec., p. 22).

The work of changing the grade was actually begun at the bridge and proceeded downwards, Mr. McQuade remonstrating all the time (Rec., p. 26). Previously to changing the grade the railroad company's servants proceeded to lay water pipes for the purpose of conducting off the surface waters (Rec., pp. 22–23), and Mr. McQuade objected to this action also (Rec., p. 26) and suggested that the grade be shortened somewhat, so that it would end before reaching his house and thus not interfere with him (Rec., p. 29). To this the railroad people agreed, and the damage to the property being thus reduced to an extremely small item the plaintiff-in-error consented to accept from $200 to $300 for such damages (Rec., p. 29). By this shortening the beginning of the altered grade would have been brought to the west of his property, thus leaving the street in its original condition in front, and the injury would simply have been such as would necessarily arise from the inlet and its attendant bad odors and stagnation (Rec., p. 30).

A resolution was accordingly adopted shortening the grade 21 feet (Rec., p. 29). But the railroad company *departed* from the arrangement and undertook to do something wholly different. Of course the plaintiff-in-error objected, and after some further parleying the railroad company refused to pay Mr. McQuade the sum at which he fixed his damages, and the negotiations ceased (Rec., pp. 29–30).

All this happened in November, 1891. And in the spring of the following year, the authorities having left the street incomplete, McQuade asked the railroad company's representatives what they proposed doing to finish the work. They neglected to do anything and also failed to pay him any damages, and accordingly he removed the objectionable inlet from before his premises. Thereupon the railroad company put it back and proceeded to extend the street-grade to the length

authorized by the original ordinance (Rec., pp. 23–30). While they were making the alteration in the sidewalk the plaintiff-in-error vigorously objected and endeavored to prevent the making of the unlawful alteration by physical interference. The railroad company, however, aided by the City, succeeded in making the alteration in spite of McQuade's endeavors to prevent it, and raised the grade in front of his premises, putting in new earth and setting flagstones and bricks at the higher elevation, thus closing his cellar windows and burying his stoop (Rec., pp. 6–9, 12, 23–24). Thereafter the plaintiff-in-error removed the flagstones, notified the Pennsylvania Railroad Company of the fact and renewed his objections (Rec., 11–24).

All of the plaintiff-in-error's objections were founded on the fact that he had never been compensated for the damages done to him (Rec., p. 27). No agreement was ever entered into with him with reference to his compensation for damages, either by the City or the railroad company, and the City never even offered him a dollar. The only offer of the railroad company was the rejected one of $500 already referred to. No estimate under or in pursuance of any legal proceedings was ever made (Rec., p. 20). No legal proceedings to procure such an estimate were ever even begun.

In March, 1894, the City of Trenton filed a bill in equity setting forth these facts and praying for an injunction against the hindrance by the plaintiff-in-error of the relaying of the pavement and against his future interference with the carrying out of the ordinance (Rec., pp. 4–8). To this bill the plaintiff-in-error made answer, denying the complainant's right to the relief prayed for (Rec., pp. 16–19), but the Chancellor (Rec., pp. 32–33), with all of the above facts before him, issued the injunction prayed for, which, upon appeal to the New Jersey Court of Errors and Appeals,

was affirmed in all respects (Rec., pp. 33–35). The present writ of error was obtained for the purpose of reviewing these proceedings (Rec., p. 1).

The constitutional question was expressly raised by the answer of the plaintiff-in-error to the bill of the City of Trenton for an injunction, and, on the appeal to the New Jersey Court of Errors and Appeals, was included in his petition among the grounds upon which he claimed that the Chancellor's decree was erroneous (Rec., p. 34).

The assignment of errors filed with the petition to this Court for a writ of error to the New Jersey Court of Errors and Appeals is set forth on pages 1 to 3 of the Record, and the errors therein recited are those which we now assert and intend to urge.

The Chancellor's decree, affirmed by the New Jersey Court of Errors and Appeals, to which Court the present errors are assigned, was based upon the views contained in the opinion of Vice-Chancellor Bird which preceded the decree. That opinion proceeds in part as follows (Rec. pp. 31–32):

"Independently of the interference of the City authorities and what seems to be on their part the exercise of a legal right, the only question that can be litigated is the question between McQuade and the city with respect to the damages which he is entitled to. These damages he might have had ascertained before the company or the city took any steps whatever. But he allowed the company to go on and make all the changes necessary to the completion of the undertaking which had been consented to by the city, without taking direct proceedings to compel them to ascertain his damages and to compensate him therefor."

The Vice-Chancellor was clearly in error, as our foregoing statement of the facts shows, in saying that McQuade allowed the Railroad Company to go ahead and make the changes complained of. He made continual

attempts to prevent that action, and he was not called upon, as we shall point out later, to become the actor in judicial proceedings to collect compensation, the computation and payment of which was made by the *law of the land* a condition precedent to the acquirement of any rights against him by the Railroad Company.

We contend that the view of the law taken by the Chancellor and adopted by the Court of Errors and Appeals was erroneous; that neither the City of Trenton nor the Pennsylvania Railroad Company ever acquired any right to interfere with any property of the plaintiff-in-error; that their action in so interfering was a wrong and a violation of the Constitutions of New Jersey and the United States; that the earth and stone which they piled in front of his houses created a nuisance which he had the right to abate; and that the decree of the Court of Errors and Appeals sustaining the perpetual injunction against his exercise of this right, together with the actions of the City and the Railroad Company under the ordinance, and their failure to institute proceedings for the computation of the damages due, constituted a taking of private property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

POINTS.

A.

The Fourteenth Amendment of the Constitution of the United States prohibits the States from taking private Property without Compensation, or for any but a public Use.

"In the Fourteenth Amendment * * * the prohibition against the State is confined to its depriving

any person of life, liberty or property without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a *public use* becomes material in this court, even where the taking is under the authority of the State instead of the Federal Government."

Fallbrook Irrigation District vs. *Bradley*, 164 U. S., 158.

In the same way the question whether private property has been taken *without just compensation* under the authority of a State becomes material in the Supreme Court of the United States, by virtue of the prohibition contained in the Fourteenth Amendment against the taking of private property without due process of law.

The expressions, "*due process of law*" and its synonym, "*the law of the land*," as Mr. JUSTICE JOHNSON said in the case of *Bank of Columbia* vs. *Oakley* (4 Wheat., 235, 244), "were intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice."

The phrase, "*due process of law*," refers "to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

Hurtado vs. *California*, 110 U. S., 516.

"Due process of law is process according to the law of the land. This process in the States is regulated by *the law of the State.*"

Walker vs. *Sauvinet*, 92 *U. S*, 90.

In the case of *Pumpelly* vs. *Green Bay Company*, 13 Wall., 166, this Court had occasion to inquire into the power of the State of Wisconsin to take private property without compensation; and, denying such right, it enforced the protection afforded to the citizen by the United States Constitution.

"Though the Constitution of the United States," said the Court, "provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal Government, and not on the States. The Constitution of Wisconsin, however, has a provision almost identical in language, viz., that the property of no person shall be taken for public use without just compensation therefor. Indeed, this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no State is now without it."

The inquiry, then, at this point is: Does the organic law of the State of New Jersey prohibit the taking of private property without just compensation? That inquiry must be answered in the affirmative.

B.

The organic Law of New Jersey forbids the Taking of private Property for public Use without just Compensation first made.

The Constitution of the State of New Jersey contains the following provisions:

Art. I., sec. XVI.:

"Private property shall not be taken for public use without just compensation."

Art. IV., sec. VII., subd. 8 :

"Individuals or private corporations shall not be authorized to take private property for public use without just compensation *first* made to the owners."

With these fundamental provisions in the Constitution of New Jersey, we are brought to the question whether they have been complied with in the present instance. That question must be answered in the negative.

C.

The organic Law of New Jersey forbidding the Taking of private Property for public Use without just Compensation has not been complied with in the present Instance.

I.

NO JUST COMPENSATION FOR THE PROPERTY TAKEN HAS BEEN MADE OR OFFERED.

No proceedings have ever been instituted for the purpose of ascertaining what damages the plaintiff-in-error has sustained. His easements of light, air and access have been seriously curtailed. The railroad company has succeeded in obtaining approaches to its bridge at the expense of the plaintiff-in-error, and nothing whatever has been done or attempted to be done towards his compensation. The prohibition contained in the Constitution of the State of New Jersey has been openly violated, and the violation extends to the Fourteenth Amendment of the Constitution of the United States.

II.

THE ORDINANCE OF THE CITY OF TRENTON UNDER WHICH THE ALTERATION IN THE STREET WAS EFFECTED CONTAINS NO PROVISION FOR THE COMPUTATION OR PAYMENT OF DAMAGES.

This ordinance under which the railroad company obtained the right to enhance the value of its property by depriving other surrounding property-owners of certain of their premises or easements makes absolutely no provision for ascertaining the amount of compensation due to those property-owners, or for paying, or securing to them, any such compensation. The entire ordinance is set forth on pages 13–15 of the record.

The sole references to damages contained in the ordinance are found in the clauses requiring the railroad company to bear all the expenses of the proposed changes and to *indemnify the City of Trenton* against any such expenses or "losses that may be incurred as damages to property affected, or otherwise, by the said change of grades and the said vacation of portions of said street, * * * which could be enforced against the city by suit." (Record, pp. 13–15.)

Here is no provision for the computation and payment of damages to the owners of the affected property, or for the securing to those owners of any future compensation. The City simply provides for its *own* security against possible future *lawsuits*, practically declaring in the ordinance itself that it means to take no steps whatever to compensate the property-owners, but will calmly await suits by them, if they see fit to sue, and will look to the railroad company for indemnity in case such suits are successful. As for the railroad company, with the exception of this indemnity-bond to the City, it is to go free of all respon-

sibility, and is empowered by the ordinance to seize the property of citizens of the State for its own purposes without, as a condition precedent, or at any time, making any provision to compensate them for their losses. This is plainly unconstitutional.

But it may be said that this ordinance, being the act of a municipality, is to be considered in the light of the general powers vested in that municipality by the legislature of the State; and that therefore we must look elsewhere, in the Charter of the City of Trenton, or in the General Statutes of New Jersey, to find, if we can, a provision for the compensation of property-owners in such cases. We will now examine those laws.

III.

The provision in the Charter of Trenton as to the Alteration of Streets has not been complied with.

By the Charter of the City of Trenton, the Common Council is authorized (Act of 1874, Title VII, sec. 76, subdiv. 1):

"To lay out, accept and open any street, road, highway or alley, public park or square within said city; to order and cause any street, road, highway or alley already laid out, or which shall hereafter be laid out, to be vacated, straightened, *altered* or widened, and to take and appropriate for such purpose any *lands and real estate*, upon making compensation to the owner or owners thereof, as is hereinafter mentioned and provided."

Provisions then follow, establishing a complete method of procedure for determining the damages due to the owners of property taken under this authority, to which specific reference will be made at a later point in this brief (page 20).

The above-quoted provision does not apply to mere *changes of grades*. But the erection in a street of an approach to a railroad bridge is an *alteration* of the street within the above provision and not a mere *change of grade*.

Reed vs. Camden, 24 Vr., 322.

In that case it was held that a provision in the Camden Charter authorizing the Camden Council to cause streets to be "vacated, opened, *altered* or widened" (the very language used in the charter-provision which we are now considering) covered a change effected in a street of Camden under an ordinance in behalf of this same Pennsylvania Railroad Company whereby the latter, on indemnifying the City of Camden, was authorized to build an elevated bridge and to construct approaches thereto. Provision, however, had been carefully made for compensating the owners of property along the line of change, and proceedings had been actually taken to fix the amount of such compensation.

If, therefore, the property taken in this instance could be regarded as falling within the description of the above-quoted provision, namely, "*lands and real estate*," then the ordinance altering Ferry street and the action taken thereunder went beyond the powers of the City of Trenton, since the procedure prescribed in the charter for computing and paying compensation was not complied with. The requirements of that procedure will be discussed at a later point in this brief (page 20).

Where, on the other hand, as is the case here, the property taken does not fall within the description "*lands and real estate*," then the above-quoted provision does not apply and we must look elsewhere in the charter or in the general statutes of the State for some clause or act providing a method of computing

and paying compensation upon the taking of such property as was here taken during the *alteration* of streets.

No such clause or act can be found. The statutes of New Jersey are silent on the subject, and the property taken not being "*lands*" or "*real estate*," the seizure thereof by the City of Trenton and the railroad company, instead of being simply without compliance with an express statutory provision as to compensation, was absolutely without any express statutory authority whatever, and was in utter disregard of the Constitutions of New Jersey and the United States. For it is clear that such a taking of property as occurred in this case falls within the prohibition of those constitutions. In the absence of statutory provisions to the contrary, consequential damages caused to abutting property-owners by mere *changes of grade* in a street do not of course constitute a taking of property within the meaning of constitutional law. But where, as here, the *alteration* in the street is more than a mere *change of of grade*; where it casts an *additional* servitude upon abutting property-owners and deprives them of valuable easements which were not surrendered at the time when the street became a street; it is clear that the law reaches such an alteration and attaches to it the condition of compensation.

"If the grade of a street is changed otherwise than is authorized by law, the City will be held liable for injuries caused by it."

Dillon on Municipal Corporations, Note to sec. 990 and cases there cited.

"Power to reduce streets to an established grade without liability therefor does not include power to obstruct or authorize the obstruction of streets by the approach to a bridge in a public street whereby the abutting owner's access to the street is prevented,

and water caused to flow and drain upon his property. So the construction by a city under express legislative authority of a levee along Front street to protect the city against inundation of a river after a constitutional provision took effect which makes the City liable for private property damaged for public use where no part of the plaintiff's property was taken—the levee occupying the street alone—but where the plaintiff's access was interfered with and water was thrown by the embankment upon his property, was held to render the City liable for the damages thereby occasioned. The embankment was not regarded by the Court as a mere elevation of the grade of the street, and as being made to improve the street, and hence was not within the uses to which the street was dedicated or acquired, but was an appropriation of the street to a new use."

Dillon on Municipal Corporations, sec. 990, and cases there cited.

To summarize, if the change made in Ferry street was not a mere change of grade, then, the property taken not being *lands* or *real estate*, no provision whatever exists as to compensation; if, on the other hand, such property had been *lands* or *real estate*, then the provision in the Trenton Charter as to compensation would still have been wilfully neglected by the City and the Railroad Company, as no attempt was ever made to comply therewith.

IV.

THE PROVISIONS IN THE CHARTER OF TRENTON AND THE GENERAL ROAD ACT OF NEW JERSEY AS TO CHANGES OF GRADE WERE NOT COMPLIED WITH.

It may be argued that the alteration in Ferry street under the ordinance in question was a mere *change of grade*. In that case the applicable provision of the Charter of Trenton is contained in title VII., section 86, which reads as follows:

"That it shall be the duty of the common council, as soon as convenient, to establish, by ordinance, the

grades of the several streets and alleys which now are or may hereafter be opened in said city, and it shall not be lawful, after the same shall have been so established, to alter the grade of any street or alley, except by ordinance, nor shall any such ordinance be passed until the common council shall have caused a notice of such contemplated alteration to be served upon the owners of lots fronting or bordering upon that part of said street or alley, the grade of which is proposed to be altered, or to be published for two weeks in two of the daily papers of said city; which notice shall state the time when the common council will proceed to consider said matter, which time shall not be less than two weeks from the time of serving or the first publication of said notice; at the time said matter shall come up for the consideration of the common council, all persons interested may appear and be heard, by themselves or their counsel, for or against the alteration proposed; all changes with such alteration of grade may render necessary in gutters, sidewalks, front fences or other property of any land-owner, shall be made by the common council at the time of altering such grade, and said common council shall have a right to recover of any land-owner who was an applicant for such alteration the expense of making such change in his or her gutter, sidewalk, front fences or other property, together with costs of suit, by an action of debt in any court of competent jurisdiction, in the name of 'the inhabitants of the city of Trenton,' against such land-owner for so much money laid out and expended by them for the use of such owner, and declare generally and give the special matter in evidence."

This section, it will be observed, contains *no* provision for computing or paying to the owners of abutting buildings any damages due to a change of grade. But this desideratum is supplied by the GENERAL ROAD ACT of the State of New Jersey (General Statutes of New Jersey, vol. III., p. 2820, secs. 70-75), which reads on this subject as follows:

"70. That an action upon the case doth and shall lie in behalf of any person owning any house or other building standing and erected upon any street or high-

way, the grade whereof shall be, or shall have been, altered by virtue of the ordinance, resolution or other proceeding of the legislative authority of any city, borough or town corporate in this state, to recover from the said city, borough or town corporate, all damages which such owner shall suffer by reason of altering any such grade; *provided*, that this act shall not be construed to authorize any action for damages by any such alteration already actually worked and put into effect; *and provided further*, that no such action shall be brought after the expiration of twelve months from the working of any such grade.

"71. That all provisions in any charter or law of this state, whereby the expenses of working any grade established in lieu of a former grade existing, and according to which buildings have been erected, are directed to be borne by the owners of land in any street or highway so graded, shall be and the same are hereby repealed.

"72. That the foregoing provisions respecting grades shall not refer to any city, town or borough whose charter or any supplement thereto now existing, or which shall hereafter be passed, provides or shall provide for assessing and paying compensation to persons injured by the making of grades established or to be established.

"73. That the grade of no street, in any city or town which has been built on, shall be altered, unless by the consent of the majority of owners in interest of the lots fronting on the part proposed to be altered, *nor without paying to the owners of such buildings the damages sustained by the alterations of such grade.*

"74. That the damages mentioned in this act, to be paid to such owners, shall be assessed upon and paid by the lands and real estate benefited thereby, in proportion to the benefits received; and such damages shall be ascertained, estimated and assessed, and the amount thereof shall afterward be justly and equitably assessed and apportioned upon the lands and real estate benefited thereby, by commissioners to be appointed, and who shall act in all things in the same manner as now provided in the respective charters of the several cities, boroughs and towns corporate in this state, for the laying out, opening or widening

any street, highway, road or alley, and all proceedings in such matters shall be in conformity with and analogous to the proceedings directed and the privileges allowed in such charters; and such provisions are hereby extended and made applicable in all things to the estimating, payment, apportionment and collection of such damages in the same manner as if such subject had originally been embraced therein.

"75. That nothing in this act contained shall be so construed as in any manner to affect any contract or contracts which may have been entered into by the authorities of any city, borough or town corporate in this state, with any person or persons for the working, grading, leveling or otherwise improving any street, highway, road or alley."

These provisions apply, of course, to the streets of the City of Trenton, and it has been held that the grades of streets cannot be changed *without paying damages* to the owners of abutting buildings.

State, Hudson Co. vs. *Seymour*, 6 Vr., 47.

By section 74 of the Road Act above quoted the procedure to be followed in computing and paying the damages provided for is made analogous to and identical with the procedure prescribed by the respective charters to be followed in cases of laying out, opening, *altering* or widening streets in the respective municipalities. That procedure, in the instance of the City of Trenton, is prescribed, as has already been pointed out, by sections 79–81 of the Charter.

Thus, then, if the bridge approach erected in Ferry street is to be regarded as a mere *change of grade*, the statutes of New Jersey required the *same* computation and payment of damages for the taking of *any* property rights for that purpose which, if that approach is to be regarded as an *alteration* in the street, they required for the taking of any "*lands*" or "*real estate*."

We have, therefore, reduced the discussion to the three following propositions:

(*a*) If the erection in Ferry street was an "*alteration*," the property taken not being "*lands*" or "*real estate*," the ordinance and the proceedings thereunder were absolutely without statutory authority and were in direct defiance of the Constitutions of New Jersey and the United States.

(*b*) If the erection in Ferry street was an "*alteration*," and the property taken could be regarded as "*lands*" or "*real estate*," the ordinance and the proceedings thereunder were, nevertheless, in violation of the Constitutions of New Jersey and the United States, because the procedure required by sections 79–81 of the Trenton Charter was not pursued or attempted to be pursued.

(*c*) If the erection in Ferry street was a mere *change of grade*, whatever the nature of the property taken, the ordinance and the proceedings thereunder were in violation of the said Constitutions, because the procedure required by sections 79–81 of the Trenton Charter was not pursued or attempted to be pursued.

V.

THE PROCEDURE PRESCRIBED BY SECTIONS 79–81 OF THE TRENTON CHARTER FOR THE COMPUTATION AND PAYMENT OF DAMAGES WAS NOT PURSUED.

The procedure which was thus wilfully neglected by the City and the Railroad Company in taking the property of the plaintiff-in-error is prescribed by sections 79–81 of the Trenton Charter. It is as follows:

"79. And be it enacted, That whenever the common council shall determine, by ordinance, to lay out and open any street, road, highway or alley, public park or square within said city, or to alter, widen or straighten

any street, road, highway or alley, or to make any sewer or drain in any part of said city, and to take and appropriate for such purpose any lands or real estate, they are hereby authorized to treat with the owner or owners thereof for the same, and for the purpose expressed in such ordinance, they may purchase such lands and real estate of the owner or owners thereof, and make such compensation therefor as they shall judge reasonable, and thereupon shall receive from such owner or owners a conveyance of such lands and real estate to the city, and such compensation shall constitute a part of the whole amount of costs, damages and expenses to be assessed under and in pursuance of the provisions contained in this act.

"80. And be it enacted, that when the said common council cannot agree with the owner or owners of such required lands or other real estate for the same, or when by reason of the legal incapacity or absence of any such owner or owners, no such agreement can be made, it shall be lawful for the "board of city assessors," and they are hereby required upon application in writing of the said common council, signed by their presiding officer, which application shall specify the street, road, highway or alley proposed to be laid out, widened or altered, with the alterations proposed to be made, or the sewer or drain to be made, and the land or other real estate, with the appurtenances intended to be taken for such purpose, to make an estimate and assessment of the damages that any such owner or owners will sustain by laying out, altering or widening any such street, road, highway or alley, or making such drain or sewer; and in estimating and assessing such damages the said Board of Assessors shall have due regard as well to the value of the land or other real estate, with the appurtenances, as to the injury or benefit of the owner or owners thereof by laying out, altering or widening any such street, road, highway or alley, or making such sewer or drain, and it shall be the duty of the said Board of Assessors after estimating said damages, to assess the amount thereof, together with the sums which may have been agreed upon as the price of any of the lands or other real estate to be taken for such purpose aforesaid, between the common council and any of the owners of

such lands or other real estate, fairly and justly upon such lots or subdivisions of lots as in their opinion will be benefited by said improvement, specifying in such assessment such lots or subdivisions of lots, by the letters and numbers by which they are distinguished on the city atlas, together with the name of the respective owner or owners thereof, and the amount assessed upon each lot, which said assessment shall be embraced in the report of the said board of assessors hereinafter directed to be made; and in cases where the common council shall agree with the owner or owners of such lands as to the compensation therefor, the board of city assessors shall make their estimate for damages in accordance therewith.

"81. And be it enacted, that the common council shall designate a time and place for the meeting of the said "board of assessors," not less than twenty days from the date of said application, of which time and place the city clerk shall give notice by advertisement, in not less than two of the daily newspapers published and circulated in said city, at least ten days before the time of meeting; and it shall be the duty of the said board of assessors, having first taken and subscribed an oath or affirmation before the mayor or city clerk, fairly and impartially to execute the duties imposed upon them by this act, to meet at the time and place appointed to proceed to view the said lands or other real estate, with the appurtenances, and to make a just and true estimate and assessment as aforesaid, and for this purpose the said board of assessors shall have power to swear and examine witnesses, and to adjourn from time to time, and shall report their proceedings to the said common council, with the assessment and appraisement aforesaid, which report shall be made in writing, under the hands and seals of said members of said board of assessors, or any two of them, and filed within thirty days after their first meeting as aforesaid together with the said application and appointment, and oaths and affirmations of the said assessors, with the clerk of said city, there to remain of record; and the clerk of said city shall lay a report before the common council at their next meeting thereafter, which report or copy thereof, certified by the said city clerk, shall at all times be considered as plenary evidence of the power of common

council to enter upon, take and use the said land or other real estate, with the appurtenances, the city treasurer first tendering to the owner or owners thereof, if resident in this state, the amount so awarded them; but if any such owner is not a resident of the city, or, upon due inquiry, cannot be found therein, or is a lunatic or idiot, or under age, or if for any other lawful cause he is incapacitated to receive the same and sign a proper receipt therefor when tendered, then the said treasurer shall make affidavit of such facts, and file the same with the city clerk, and the common council shall, after inquiry into the facts of the case, cause the amount to be kept in the city treasury or invested in good security, for the use of the person for whom it may be due, and the said moneys shall be paid by the city to the person or persons entitled thereto, on demand, with the interest collected on the same."

By these sections, it will be seen, the Common Council are authorized to treat with the owners and to purchase the property in question by *agreement*. But if they cannot agree with the owners, they must apply in writing to the Board of City Assessors, specifying the street, intended alteration and property to be taken, and the Board of City Assessors are then directed to make an estimate and assessment of the damages sustained by the owners. The Common Council must designate a time and place for the meeting of the Board of Assessors, of which time and place the clerk must give notice by advertisement in not less than two daily Trenton newspapers. The Board of City Assessors are vested with power to call witnesses, to take testimony and to adjourn hearings from time to time, and must report their proceedings to the Common Council in writing and file their report with the said clerk, who is then required to lay a report before the Common Council at their next meeting, and THEN FOR THE FIRST TIME *we find the statute recognizes the power of the city to enter upon, take and use the property needed, the City Treasurer, however,* FIRST TENDERING TO THE OWNER THE AMOUNT SO AWARDED.

VI.

THE COMPUTATION AND TENDER OF DAMAGES WAS A CONDITION PRECEDENT TO THE RIGHT OF THE CITY AND THE RAILROAD COMPANY TO TAKE THE PROPERTY OF THE PLAINTIFF-IN-ERROR.

The above analysis of the provisions of the statutes shows that, under the law of the land in New Jersey, the amount of the damages must be ascertained and assessed by the proceedings prescribed in the act, and must be tendered to the owners injured, *before* any right to cause the said damages vests in the municipality, or in those acting under it, such as the railroad company. This is in accordance with the express provisions of the New Jersey Constitution and the general doctrine that private property cannot be taken for public purposes until *after* the value of the property is determined by due process of law, and is at least tendered to the owner whose rights are to be sacrificed.

While the right to take private property for public use is necessarily allowed to every government, it is a primary requisite that compensation shall be made for the property taken. The effect of the right of eminent domain against the individual "must be nothing more than a power to oblige him to sell and convey when the public necessities require it," and the compensation must be *pecuniary* and must also be *certain*. It is not competent for the State, or one of its political divisions or municipalities, or for private corporations authorized by the State, to deprive any person of his property and to "turn him over to an *action at law* against a corporation, which may or may not prove responsible, and to a judgment of uncertain efficacy; for the consequence would be in some cases that the party might lose his estate without redress in violation of the inflexible maxim upon which the right is based."

Cooley's Constitutional Limitations, p. 694.

More particularly is this so when the taking is by a private corporation — as in the present case. Suppose for a moment that some general provision for compensation had been made in the Trenton ordinance — which is not, however, the fact — upon what fund was this plaintiff-in-error to rely? Would he not have been turned over to an action at law against a corporation which might or might not prove responsible? The ordinance, it will be observed, was procured by the *Pennsylvania Railroad Company* for its *own* convenience in widening its tracks. The widening of the roadbed made it desirable to heighten the street-bridge extending over the tracks and the grade of the streets was changed *only* in order to bring them gradually to a level with the bridge. The purpose of the ordinance was not in any sense municipal, and the changes were effected purely for the benefit of the railroad corporation. It is for this reason that such an alteration cannot be regarded as a mere *change of grade*. If any benefits were to accrue to the municipality they were incidental and remote. Had the changes contemplated by this ordinance been for the benefit of the municipality, and not for the benefit of the railroad company, the latter would not have been called upon by the Common Council to do the work with its own money, to pay all the expenses and to indemnify the City against suits by property-owners. If the changes had been for municipal purposes, the Common Council would have exercised the power vested in it by the Charter of the City of Trenton and have assessed the expenses against benefited property along the line of change. It well knew, however, that such an assessment would have been wholly improper, for no argument is needed to support the proposition that, in the absence of the most express provision to that effect, the Legislature of a State cannot be assumed to have delegated to a municipality power to

make any conceivable change in the streets for whatsoever purpose or for whosesoever benefit.

It is, therefore, open to serious doubt whether the power delegated by the Legislature to the Trenton Common Council to *alter* streets and to take private "*lands and real estate*" for that purpose upon making compensation, or to change the grades of streets in conformity with the Charter and the General Road Act, extended to the making of the ordinance in question. The exercise of the right of eminent domain is limited to appropriations of private property for *public purposes*, and it may well be doubted whether the Common Council, in the exercise of their delegated power, could irrefutably declare that to be a *public purpose* which all the facts disclose was *no* public purpose at all.

However that may be, it is perfectly patent that *before* the City of Trenton or the Railroad Company could acquire any right to interfere with this property, the statutory requirements as to the computation and tender of damages had to be complied with. Not only do the terms of the New Jersey Constitution already quoted (Art. IV., sec. VII., subd. 8) and of the New Jersey statute make this apparent, but many decisions to that effect have been reached by the Courts of New Jersey.

Doughty vs. *Somerville & Easton R. R. Co.*, 3 Hal. Ch., 51.
Morris & Essex R. R. Co. vs. *Hudson Tunnel Co.*, 10 C. E. Gr., 384.
Carson vs. *Coleman*, 3 Stock., 106, 525.
Johnson vs. *Baltimore & New York R. R. Co.*, 18 Stew., 454.

So jealous indeed is the State of New Jersey in its protection of this fundamental right of property that

it is the uniform practice of the Court of Chancery in that State *to interfere by injunction*, as it did in the cases above cited, and thus to forbid the taking of the property of one person or corporation by another without compensation *first* paid, so as not to leave the property-owner to a mere action for damages.

Jersey City and Bergen Co. vs. *Jersey City and Hoboken R. R. Co.*, 5 C. E. Gr., 62.
Folley vs. *Passaic*, 11 C. E. Gr., 216.

In the case cited from 5 C. E. Green, the New Jersey Court of Chancery said :

"It is the settled doctrine of this Court, to prevent the property of one person or corporation from being taken by another, for public or any use without compensation *first* paid. In almost every case of this kind, compensation could be made in damages recoverable in an action at law, and experience shows that juries do not generally give inadequate damages ; yet this Court always interferes by injunction, and does not permit property to be taken and the party put to his action."

D.

The Plaintiff-in-Error had a Right to prevent the City of Trenton and the Railroad Company and their Servants from entering upon or taking Possession of his Property, and also to remove the Obstructions placed by them in front of his Buildings.

We have shown that the plaintiff-in-error was by the ordinance and the action taken thereunder deprived of his property without due process of law in violation of

the Constitutions of New Jersey and of the United States; that through their failure to provide for and tender to the plaintiff-in-error just compensation for the property so taken, both the City of Trenton and the railroad company failed to acquire any right to interfere with or enter upon the said property. The act of these parties in placing obstructions of stone and earth in the street in front of Mr. McQuade's buildings, particularly damaging him and infringing his rights of property, was therefore a wrongful and illegal act, without the shadow of justification or authority.

Ballantine vs. *Kearney*, 23 Vr., 338.

That the obstructions constituted a private nuisance entitling the plaintiff-in-error to redress is clear.

"While the State may restrict its own right, it cannot restrict or take away the rights which are purely individual, even though they are intimately associated with the public right. An example has been given in another place of a railroad laid down in a public highway by State consent, and it was stated that this consent would not empower the railroad company to cut off an adjacent land-owner from convenient access to the street. This right of access is an individual not a public right, and the land-owner, in claiming damages for being deprived of it, is complaining not of a public but of a private nuisance."

Cooley on Torts, p. 733.

In *Stetson* vs. *Faxon* (19 Pick., 147) a warehouse projecting into a street and obstructing the view from the plaintiff's warehouse was held to be a nuisance.

In *Knox* vs. *New York* (55 Barb., 404) a bridge built so as to prevent entrance to a building was held to be a nuisance.

In *Schulte* vs. *N. P. T. Co.* (50 Cal., 592) a wall extending into a street was held to be a nuisance.

If a street is obstructed so that access to one's premises is hindered or cut off, it is actionable.

Callanan vs. *Gilman*, 14 N. E. Rep., 264, N. Y.

Brakken vs. *Minn., etc., Ry. Co.*, 29 Minn., 41.

Wilder vs. *De Cou*, 26 Minn., 10.

The plaintiff-in-error here might have brought suit in the Court of Chancery of New Jersey and have obtained an injunction prohibiting the alteration in Ferry street under the ordinance without compliance with the statutory provisions as to damages. He had a *concurrent* right to abate the nuisance created by the obstructions without recourse to the courts.

"One instance in which redress by the act of the party is admitted is where a nuisance exists to his prejudice; either a private nuisance or a public nuisance from which he suffers a special and peculiar injury. The redress here consists in removing that which constitutes the nuisance, and it is allowed, not because of any injury it may have done, but to prevent the injury it may do. It is, therefore, in some sense, a preventive remedy, not a compensatory remedy; for damages suffered the party is left to the ordinary action. The question who may abate a nuisance may depend upon whether the nuisance is public or private. If it is a private nuisance, he only can abate it who is injured by its continuance; if it is a public nuisance, he only may abate it who suffers a special grievance not felt by the public in general. Therefore, if one places an obstruction in a public street, an individual who is incommoded by it may remove it."

Cooley on Torts (p. 48).

Lincoln vs. *Chadbourne*, 56 Me., 197.

The proprietors of a steamboat on a navigable river may tear away sufficient of a bridge to enable them to take their boat through where the bridge has been constructed without a draw and the proprietors after

notice have neglected to remove the bridge or put in a draw.

State vs. *Parrott* (71 N. C., 311).

One may remove a wharf built in navigable water in front of and disconnected with his land which prevents access to it.

Larson vs. Furlong (63 Wis., 323).

In *Brown* vs. *Perkins* (12 Gray, 89, 101) Mr. CHIEF JUSTICE SHAW says:

"The true theory of abatement of nuisance is, that an individual citizen may abate a private nuisance injurious to him, *when he could also bring an action;* and also when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing."

In *Wetmore* vs. *Tracy* (14 Wend. 250), the right of an individual citizen personally to abate a fence which encroached upon a public highway was sustained by the Supreme Court of the State of New York. The Court, speaking through Mr JUSTICE NELSON, said among other things:

"That any citizen has a right to abate a nuisance of this kind, was a question considerably discussed in the case of *Hart* vs. *Mayor of Albany* (9 Wendell, 589, 607, 608), and no doubt was entertained upon it."

In *Harrower and Others* vs. *Ritson* (37 Barb., 301) the Supreme Court of New York said:

"Private nuisances may be abated by the individuals aggrieved by them (3 Blackstone's Com. 5; 2 Bouv. Inst., 574) and public nuisances should only be subject to abatement by one especially aggrieved by them. Blackstone says: 'If a new gate be erected across a public highway, which is a common nuisance, any of the King's subjects passing that way may cut it down and destroy it!'"

The same doctrine is, of course, recognized in the State of New Jersey.

In *Manhattan Manufacturing Co.* vs. *Van Keuren*, 8 C. E. Gr., 251, the Court of Chancery said:

"At common law, it was always the right of the citizen, without official authority, to abate a public nuisance, and without waiting to have it adjudged such by a legal tribunal. His right to do so depended upon the fact of its being a nuisance. If he assumed to act upon his own adjudication that it was, and such adjudication was afterward shown to be wrong, he was liable, as a wrong-doer, for his error, and appropriatiate damages could be recovered against him. This common law right still exists in full force."

And see *Brown* vs. *de Groff*, 21 Vr., 409.

But it is unnecessary to accumulate authorities to sustain so familiar a proposition of law as that which embodies the individual's right to abate a nuisance wherever he might bring an action because of its existence.

These two rights are concurrent. Each is recognized by the *law of the land* as a necessary and proper redress for the protection of private property. It is no more possible to take away the one than the other without violating the law of the land. The plaintiff-in-error occupies precisely the same position that he would have occupied if the New Jersey Court of Errors and Appeals had enjoined him perpetually from asking the Chancellor for an injunction against the construction and maintenance of these nuisances. It is not for the Courts to say which of the two remedies allowed by the law of the land must be pursued. That law recognizing both, the citizen is left to his election, and to take away this right of election is to take away something which is guaranteed by the law of the land.

E.

The Injunction granted by the Chancellor and sustained by the New Jersey Court of Errors and Appeals deprived the Plaintiff-in-Error of the foregoing Right in Violation of the Fourteenth Amendment.

By the decree of the Chancellor, filed April 12, 1895 (Rec. pp. 32–33), the plaintiff-in-error was "perpetually enjoined and restrained not only from further interfering with the laying and completion of the sidewalk and curbing mentioned in the bill of complaint, but also from in any manner removing, disturbing or interfering with the said pavement, sidewalk or curbing after the same shall have been completed." And it was further ordered and decreed that the plaintiff-in-error should pay to the City of Trenton the costs of the suit to be taxed, and that execution issue therefor according to the practice of the Court.

Upon the appeal to the New Jersey Court of Errors and Appeals, that Court decreed that the decree of the Court of Chancery should be in all things affirmed, the costs in both courts to be paid by the appellant (the present plaintiff-in-error), and that the petition of appeal should be dismissed. And it was further ordered that the record should be remitted to the Court of Chancery to proceed further thereon according to law and the practice of said Court (Rec. p. 35).

By the above decrees of the Judicial Authority of the State of New Jersey, the plaintiff-in-error was deprived of his right to abate the nuisance created by the acts of the City of Trenton and the Pennsylvania Railroad Company in violation of the constitutions of the State of New Jersey and of the United States, by virtue of which acts and the creation and continuance

of which nuisance his private property had been taken in defiance of the said constitutions and without any compensation or any provision for compensation whatever.

We contend that under these circumstances the plaintiff-in-error has been deprived of his property without due process of law. We have already, on page 9 of this brief, reminded the Court of the definition which has been placed upon the phrase "*due process of law.*" That under this phrase the citizen is protected against all action of the *State* repugnant to the constitutional limitation of its powers, whether that action be in form legislative or judicial, is, we submit, beyond the realm of controversy. The language of the Fourteenth Amendment is that "no state shall deprive any person of life, liberty or property without due process of law." The limitation necessarily extends to all acts of the State, by whatever branch of its final authority exercised, the effect of which must be to deprive the citizen of his life, liberty or property. The legislative, executive and judicial proceedings of the State governments are alike subjected to the ultimate revision of this Court, by virtue of its office as the final interpreter and guardian of the Federal Constitution, wherever those proceedings necessarily result in the destruction of a fundamental right of the citizen. We respectfully contend that wherever a decision of the highest court of record of a State involves one of the fundamental rights guaranteed to the citizen by the Constitution, or one of the remedies recognized by the law of the land in that State for the protection and preservation of such right, an ultimate power is vested in this Court to review such decision and to reverse it if by its effect either the right or the remedy is destroyed. Could it be successfully argued that if, contrary to the Constitution and statutes of the State of New Jersey, that State's courts should improperly deny to any citizen the

benefit of the writ of *habeas corpus*, this Court would not have the power to annul such denial and to compel judicial acknowledgment of the citizen's right to protected liberty under the Fourteenth Amendment? We think not. In the same way, where, as in this instance, a fundamental right of property, has been violated, and the highest judicial authority in a State has *prohibited* the citizen to whom that right belonged from adopting a form of redress recognized by the *law of the land* in that very State, a case has arisen under the Constitution of the United States which demands the intervention of this Court. Otherwise it would be within the power of a State, by violating its own constitution and statutes, to override every limitation in the Federal Constitution. "Due process of law" is not satisfied, and constitutional protection not exhausted, when the citizen, having sought in the highest court of a State the vindication of his constitutional rights, is dismissed thence, shorn of the remedies without which those rights are unavailing. It is no answer to say that the plaintiff-in-error might have obtained an injunction from the Court of Chancery, if he had gone thither, preventing the erection of the nuisance which he has attempted to abate. In view of the action taken by the Chancellor we have grave doubts whether he would have succeeded on such an application! But, in any event, as we have pointed out, the right of election between the remedies afforded him by the law of the land was as much a right within the guaranty of the Constitution and the protection of this Court as any other right of citizenship.

At the end of his celebrated opinion in *Marbury* vs. *Madison* (1 Cranch 180), Mr. CHIEF JUSTICE MARSHALL, after reviewing a number of clauses of the constitution said:

"Thus, the particular phraseology of the Constitution of the United States confirms and strengthens

the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution, is void; and that *courts*, as well as other departments, are bound by that instrument."

We are far from contending that for a mere judicial error of the Supreme Court of record of a State an appeal will lie to this tribunal. Undoubtedly, the clause in the Fourteenth Amendment on which we rely was not intended, and cannot be construed, to vest in the Supreme Court of the United States the power to interfere with the disposition of State questions by the appropriate State authorities. This Court, speaking through its present CHIEF JUSTICE, has expressed in a succinct manner the views which we are pressing, in the case of *Kemmler*, 136 U. S., 448.

"As due process of law in the Fifth Amendment," said Mr. CHIEF JUSTICE FULLER in that case, "referred to the law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to *that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.* Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration, justice requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses. But it was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order."

In that case the Court of Appeals of the State of New York had declared that a statute of New York

prescribing electrocution as the punishment for capital crimes was not in conflict with the clause of the New York Constitution forbidding cruel and unusual punishments. The argument was that such punishments were prohibited by inclusion in the term 'due process of law.' This Court first defined the meaning of the similar prohibition against the infliction by Congress of cruel and unusual punishments, contained in the Eighth amendment of the Federal Constitution, and declared that the punishment of death "is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous." Referring then to the decision of the Court of Appeals, then before it, where the same words as used in the New York Constitution had been similarly construed, this Court said:

"Treating it as involving an adjudication that the statute was not repugnant to the *Federal* Constitution, that conclusion was so plainly *right* that we should not be justified in allowing the writ upon the ground that error might have supervened therein."

Hence, this Court proceeded upon the principle that the Fourteenth Amendment guarantees to the citizen the *application* of "that law of the land in each State which derives its authority from the inherent and reserved power of the State exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," and examined the *New York Court of Appeals'* interpretation of the prohibition in the *New York* Constitution against cruel punishments, and upheld that Court's decision *because its interpretation was sound and in accordance with such law of the land.* This Court, we submit, did not mean by the expressions used at the end of the passage quoted on page 35th of this brief that it would uphold as "due process of law" decisions of the State courts, in-

terpretating the constitutions of the same States, which, in the opinion of this Court, are destructive of the fundamental rights of the citizen. On the contrary, the learned Chief Justice expressly asserted the reserve power of this Court to reverse any judgment of a State Court which "*committed an error so gross as to amount in law to a denial by the State of due process of law to one accused of crime, or of some right secured to him by the Constitution of the United States.*"

"We have no hesitation in saying," added the CHIEF JUSTICE, "that this we cannot do *upon the record before us.*"

But suppose the record had been different. Suppose the punishment inflicted had been a *torture*, and the Court of Appeals had declared that such punishment was not in conflict with the Constitution of New York. Would not this Court have had the power under the Fourteenth Amendment to reverse the Court of Appeals' decision, as being contrary to "due process of law," although it might at first sight seem to bear equally, *as fixing the law of New York*, upon all citizens of that State and to impose upon none "a different or higher punishment * * * than is imposed upon all for like offences"? But a more accurate analysis of such a decision would show that, even upon the test of equality, it would fall short of the constitutional requirements, because the action of a court must always be limited to the case before it, and an unconstitutional decision necessarily bears unequally upon the party deprived by it of his rights, since to him alone of the entire community the decision would deny the protection of the law.

What we are contending is that wherever a State Court's interpretation and application of the State's Constitution or the State's statutes affect one of the fundamental rights of the citizen, an ultimate question

remains for this Court to decide, to wit: Whether such interpretation and application are *subversive* of such right. And this because, to quote again from the language of Mr. CHIEF JUSTICE FULLER in the *Kemmler* case, "the amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the State governments were created to secure."

If this is true, as it undoubtedly is, must it not follow that a State Court's interpretation and application of the *body of laws* in the State, which affect one of those fundamental rights, are also subject to this Court's ultimate review in order to determine whether such interpretation and application are *subversive* of such right? What distinction can be logically drawn between the two cases? Statute and Common Law alike form the *law of the land*. Indeed, let all the existing statutes be done away with, the greater part of the fundamental law of the land would still remain intact to be administered by the Courts. Would that administration be unrestricted by the Constitution's "additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship and which the State governments were created to secure"?

To assert that the word "*State*" as used in the Fourteenth Amendment, where that amendment prohibits "*any State*" from depriving any person of life, liberty or property without due process of law, means only the *Legislature* of a State, and does not include the other governmental departments, would be to limit the meaning of this constitutional guarantee of fundamental rights in a manner manifestly contrary to its language, spirit and object. The common law extant in any State, and left unchanged by the State Constitution and Legislature, derives its authority from the State as much as any statute. By omitting to destroy it, the State, and

more especially the legislative branch of the State, tacitly ratifies and corroborates it. It would seem to follow from these considerations that the statutes and unwritten laws together form that "law of the land" in each State, the application of which in all cases this Court is authorized to compel by the Fourteenth Amendment.

By what means can this Court perform its function in that regard, except by direct action upon the courts of a State? In what way other than by writ of error addressed to the court of final resort in the State can the outraged individual call upon this Court to enforce his constitutional guaranty? With what weapon other than the *wrongful decision of its courts* can the State in any case, whether under a statute or the common law, attack the fundamental rights of citizens, protected by the United States Constitution? Even when the State Legislature has enacted a statute utterly in disregard of those rights, no individual can come to this Court with his complaint until *the State, acting through its courts*, has upheld the obnoxious statute and declared it to be constitutional. So that in every instance where a State deprives a person of his fundamental rights, that deprivation consists in the end in a *decision of the State Court* repugnant to the Federal Constitution, and, therefore, reversible by this tribunal.

This peculiar part played by the State *Courts* in violations of the Federal Constitution by the States is discussed with great strength by Mr. CHIEF JUSTICE MARSHALL in the case (already cited) of *Marbury* vs. *Madison*. There, after pointing out the superiority of the Constitution over statutes violative of its provisions, he said:

"If an act of the Legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the Courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute

a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.

"So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.

"If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

The learned Chief Justice then cites certain instances where the Constitution addresses the Courts directly, and adds:

"From these and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of Courts as well as of the Legislature."

Following precisely this reasoning of Mr. CHIEF JUSTICE MARSHALL, if the New Jersey Court of Errors and Appeals has declared that to be law which is subversive of the fundamental rights of any person to life, liberty or property, then its declaration is an act of the State of New Jersey which is violative of the United States Constitution and void. Under our form of constitutional government, it is inconceivable that anything shall be law which conflicts with the Federal Constitution, the organic law of the land. Hence in declaring a statute in such conflict to be void, this Court

simply obliterates the statute and leaves the *law* as it existed before such statute was enacted. Its subsequent action in overruling a decision of the State Court based on the void statute, is, therefore, in effect nothing but a direct action upon the power of the State, as exhibited in its *judicial* acts, and an exercise of the power of this Court to compel the *Courts* of the States to administer the *law of the land* in conformity with the Constitution regardless of futile attempts on the part of legislatures to *alter* that law. And whether the *bad* law which a State Court has proclaimed was ever arrayed in void *legislative* language, or not, cannot, we submit, logically affect the issue.

We have argued this point at length because there is a class of cases decided by this Court which at first sight might seem to conflict with the above views. But we respectfully submit that the decisions to which we refer were not intended to deny the right of this Court to overrule the decisions of State courts where those decisions are *undeniably* subversive of the personal rights of life, liberty and property. *We do not contend*—and the cases to which we allude are, we think, emphatic authorities on this point—that by the Fourteenth Amendment this Court is called upon or empowered to review the decisions of State courts in State questions; or, to use the language of Mr. CHIEF JUSTICE FULLER, in the case of *Converse*, 137 U. S., 624, "to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudications of the Courts of a State *in administering the process provided by the law of the State.*" It would indeed be intolerable if every litigant should be permitted to use this Court as a court of error to review the decisions of State courts claimed to be erroneous, rendered "*in administering the process provided by the law of the State.*"

But where such decisions, instead of *administering* that process, effectually *abrogate* it; where they *deny* to the citizen the very rights which the law of his State is fashioned to *protect*, and those rights constitute his fundamental rights of property, liberty and life, or rights incidental thereto and without which the former would be unavailing—then, we contend, it is the province and duty of this Court to declare that the State has deprived the citizen of his rights without due process of law, and to *reinstate* him in those rights as guaranteed by the Constitution.

In conclusion, we will simply refer to the cases mentioned above.

In *Arrowsmith* vs. *Harmoning*, 118 U. S., 194, the question was whether this Court would review a decision of the State courts of Ohio sustaining the action of a probate court of that State in decreeing a sale of land by a guardian in proceedings which were altogether regular, save only that the Probate Court had dispensed with the giving of a bond by the guardian, under a certain requirement of an Ohio statute, "for the faithful discharge of his duties, and the faithful payment and accounting for all moneys arising from such sale according to law."

This Court, speaking through Mr. CHIEF JUSTICE WAITE, declined to review the decision.

"It is not denied," said the CHIEF JUSTICE, "that the Probate Court had full and complete jurisdiction of the proceeding to sell the land. The statute under which the Court acted would, if followed, have furnished Arrowsmith all the protection which had been guaranteed to him by the Constitution of the United States. The bond in question was matter of procedure only, and if it ought to have been required, the Court erred in ordering the sale without having first caused it to be filed and approved. At most, this was an error of judgment in the Court. The constitutional provision

is " nor shall any *State* deprive any person of life, liberty or property without due process of law." Certainly a State cannot be deemed guilty of a violation of this Constitutional obligation simply because one of its courts, *while acting within its jurisdiction*, has made an erroneous decision. The Legislature of a State performs its whole duty under the Constitution in this particular when it provides a law for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish the parties the necessary constitutional protection. All after that pertains to the courts, and the parties are left to the appropriate remedies for the correction of errors in judicial proceedings."

We respectfully submit that the rather broad expressions used by Mr. CHIEF JUSTICE WAITE in the above passage are to be read in connection with the decision before him and with his own view of such decision, that it was " only an error of judgment in the Court " in a mere " matter of procedure." It does not seem to us that the learned Chief Justice could have intended to deny the application of the constitutional limitation to the action of State Courts in matters, not simply of procedure under the laws of the respective States, but of the *substantive* and *substantial* rights of persons to protect their lives, liberty and property. That the remarks quoted must be read with this caution seems to us clear when it is remembered that in the present case, for instance, or in the case suggested by us at an earlier point in this brief of a Court's denial of the benefit of the writ of *habeas corpus*, the citizen exhausts all of his " remedies for the correction of errors in judicial proceedings," so far as the State is concerned, when he appeals to the highest Court of the State. Yet, with the hostile decision of that Court, he is left denuded of one of his inherent and most far-reaching rights as effectually as if he had been stripped by direct, unequal and unconstitutional statutory enactment.

Moreover, Mr. CHIEF-JUSTICE WAITE limits his remarks to cases where the State Court is "*acting within its jurisdiction.*" In the present case it can scarcely be claimed that the Court of Chancery was "acting within its jurisdiction" when it granted the injunction complained of. The power of a Court of Equity does not extend to the granting of injunctions against the exercise of unquestionable rights of property. Its jurisdiction of the parties cannot draw to it jurisdiction of the subject-matter, and where, as in this case, the proper decree to have been entered under any circumstances would have been a dismissal of the bill, the Court cannot be said to have had jurisdiction of the subject-matter.

In *Ex parte Yarbrough*, 110 U. S., 651–653, Mr. JUSTICE MILLER said:

"That this Court has no general authority to review on error or appeal the judgment of the Circuit Courts of the United States in cases within their criminal jurisdiction is beyond question; but it is equally well settled that when a prisoner is held under the sentence of any Court of the United States in regard to a matter wholly beyond or without the jurisdiction of the Court, it is not only within the authority of the Supreme Court, but it is its duty, to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be, as charged, a matter of which such a Court had no jurisdiction, to discharge a prisoner from confinement."

In *Baldwin* vs. *Kansas*, 129 U. S., 52, the question was whether upon the trial of one convicted of murder in a State Court of Kansas the form of oath prescribed by the statutes of Kansas had been administered to the jurors. It was claimed that it had not been, and that, therefore, the convicted party would be deprived of his life without due process of law. This Court carefully examined the record as to the oath administered, and *agreed* with the State Court that the statement in the record, as to the form of oath administered was en-

tirely consistent with the fact that the prescribed form had been administered. It also *agreed* with the State Court that the failure of the accused to take objection at the trial to the form of oath administered was fatal to his case.

"This statement of the condition of the record" said the Court, speaking through Mr. JUSTICE BLATCHFORD, "shows that no Federal question is presented, in regard to the oath administered to the jurors, of which this Court can take jurisdiction."

If the record had been different, it is clear that the Court would have taken jurisdiction and *would have reviewed the action of the State Court in administering the oath*, and, if necessary, have afforded a new trial to the plaintiff-in-error. This case is, therefore, an authority for the doctrine for which we argue.

In re Converse, 137 U. S., 624, to which we have already referred, the petitioner had been convicted of embezzlement under a certain statute of Michigan. He had pleaded guilty to embezzlement as an *attorney-at-law*, and the question was whether this plea was a plea of guilty to the crime charged under the statute, so that the conviction entered on this plea was binding. The decision turned on the meaning of the word "*agent*" in the statute, and the Supreme Court of Michigan held that that description included an "*attorney-at-law*," and therefore sustained the conviction. This Court was asked to take the opposite view on the ground that the petitioner had thus been deprived of his liberty without due process of law. The Court, speaking through Mr. CHIEF JUSTICE FULLER, said:

"It is not our province to inquire whether the conclusion reached and announced by the Supreme Court was or was not correct, for we are not passing upon its judgment as a court of error, nor can we consider the contention that the decision was not in harmony with the state constitution and laws.

"The single question is whether the appellant is held in custody in violation of the Fourteenth Amendment to the Constitution of the United States, in that the State thereby deprives him of liberty without due process of law; for there is no pretense of an abridgment of his privileges and immunities as a citizen of the United States, nor of a denial of the equal protection of the laws. But the State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction. And, conceding that an unconstitutional conviction and punishment under a valid law would be as violative of a person's constitutional rights as a conviction and punishment under an unconstitutional law, we fail to perceive that this conviction and judgment are repugnant to the constitutional provision. Appellant has been subjected, as all persons within the State of Michigan are, to the law in its regular course of administration through courts of justice, and it is impossible to hold that a judgment so arrived at is such an unrestrained and arbitrary exercise of power as to be utterly void.

"We repeat, as has been so often said before, that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses; but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State. The Supreme Court of Michigan did not exceed its jurisdiction or deliver a judgment abridging appellant's privileges or immunities or depriving him of the law of the land of his domicile. (Arrowsmith *vs.* Harmoning, 118 U. S., 194; Baldwin *vs.* Kansas, 129 U. S., 52; *In re* Kemmler, 136 U. S., 436.)"

We submit that this decision does not affect a case where the complaint is, not that a State Court has erred in defining a word contained in an *ambiguous* State

statute, but that, with the law of the State *undeniably* in favor of the plaintiff-in-error's right to protect his property and to remove the nuisance, the State Court without the shadow of justification refused to administer that law in his behalf and absolutely denied him his lawful rights. The State Court *has* deprived him "of the law of the land of his domicile," and *has* denied to him the equal protection of the laws, since those laws, existing for the benefit of all, and within the reach of all, have been by this decree denied to him *alone*.

The case of *Hallinger* vs. *Davis*, 146 U. S., 314, does not touch the question now under discussion, and we only cite it because Mr. JUSTICE SHIRAS, in the course of delivering the opinion of the Court, showed that this Court will inquire, under the Fourteenth Amendment, into the obedience of the State courts to the process prescribed by the laws of their respective States.

"The trial," said Mr. JUSTICE SHIRAS, alluding to the trial then under discussion, "seems to have been conducted in strict accordance with the forms prescribed by the Constitution and laws of the State, and with special regard to the rights of the accused thereunder."

In *McNulty* vs. *California*, 149 U. S., 647, the question was wholly different from that now presented. There it was contended that the execution of one who had been sentenced to death would be without due process of law because certain amendments, subsequent to the date of the crime, had altered the law as it existed at that date, and these amendments had not been considered by the State Court.

"But this argument," said Mr. CHIEF JUSTICE FULLER, "amounts to no more than the assertion that the Supreme Court of the State erred as to the proper construction of the statutes of California, an inquiry it is not within our province to enter upon, *or that the*

Court committed an error so gross as to amount in law to a denial by the State of due process of law or of some right secured to the plaintiff-in-error by the Constitution of the United States, a proposition not open to discussion upon the record before us."

In the case at bar the Court of New Jersey *did* commit an error so *gross* as to amount in law to a denial by the State of due process of law, and it is to correct this error that we are before this Court. The case is wholly different from cases of judicial construction of *ambiguous* State statutes. Here, the law being certain and undeniable, the Court deliberately refused to extend its benefits to the plaintiff-in-error.

In *Caldwell* vs. *Texas*, 137 U. S., 693, Mr. CHIEF JUSTICE FULLER stated in clear terms the effect of the Fourteenth Amendment:

"By the Fourteenth Amendment," he said, "the powers of the States in dealing with crime within their borders are not limited, but no State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and, when secured by the law of the State, the constitutional requisition is satisfied (2 Kent's Comm., 13). And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and *distributive justice* (*Bank of Columbia* vs. *Okley*, 4 Wheat., 235, 244). The power of the State must be exerted within the limits of those principles, and its *exertion* cannot be sustained when special, partial and arbitrary."

It is through the courts that the power of *States* is *exerted*, through them that *distributive justice* is attained. Of what avail to the citizen are beneficial laws if he cannot secure their application by the courts in his behalf? Of what avail to him are fair trials, days

in court and opportunities to present his claims, if, after all is done, it lies within the power of Courts to *decide* in violation of the law? The Fourteenth Amendment has failed of its purpose, as proclaimed by this Court, if, extending to the *process* of courts from *summons* to *decision*, it stops short at the very juncture where, for the first time, it becomes of real importance to the citizen—we mean, THE FINAL JUDGMENT.

It is respectfully submitted that the decree of the Court of Errors and Appeals of the State of New Jersey should be reversed and the cause remanded to that Court with directions to enter a decree dissolving the injunction granted by the Court of Chancery, and with such other directions as to this Court may seem proper.

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